No. 83-1437

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

JEFFREY MAREK, THOMAS WADYCKI
AND LAWRENCE RHODE,

Petitioners,

v.

ALFRED W. CHESNY,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRIEF OF THE ALLIANCE FOR JUSTICE AS AMICUS CURIAE ON BEHALF OF ITS MEMBERS* SUPPORTING RESPONDENT

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The members of the Alliance for Justice, who join in the filing of this amicus brief, include:

Business and Professional People for the Public Interest

Center for Law and Social Policy

Center for Law in the Public Interest

Center for National Policy Review

Center for Science in the Public Interest

Consumers Union

Education Law Center

Employment Law Center

Environmental Defense Fund

Equal Rights Advocates

Food Research and Action Center

Harmon & Weiss

Institute for Public Representation

Juvenile Law Center

Mental Health Law Project

NOW Legal Defense and Education Fund

National Wildlife Federation

National Women's Law Center

Native American Rights Fund

New York Lawyers for the Public Interest

Public Advocates, Inc.

Sierra Club Legal Defense Fund

Women's Law Project

Women's Legal Defense Fund

QUESTION PRESENTED

Whether Rule 68 of the Federal Rules of Civil Procedure should be interpreted by the Court as requiring a district judge to deny a prevailing plaintiff in a civil rights case recovery for attorney's fees under 42 U.S.C. Section 1988 (and other similarly worded federal fee-shifting statutes) for all services rendered after the rejection of a Rule 68 offer of judgment if the plaintiff fails to obtain a judgment as favorable as the offer.

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INTEREST OF AMICUS CURIAE

The Alliance for Justice is a national association of public interest legal organizations. Its members, who

join in the filing of this amicus brief,1/ are typical of the public interest law firms that litigate under the Civil Rights Attorney's Fee Awards Act of 1976 (42 U.S.C. § 1988), and under other fee-shifting statutes that may be affected by the Court's decision in this case.2/

1/ Members of the Alliance for Justice are listed on the inside of the front cover of this brief.

2/ Members of the Alliance also litigate under a number of other statutes with fee-shifting provisions that may be affected by the Court's ruling in this case. These statutes include, inter alia: the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k); the Clean Air Act, 42 U.S.C. § 7607(f); the Clean Air Act Amendments of 1977, 42 U.S.C.(Supp. V) §§ 7413(b), 7604(d); the Federal Water Pollution Control Act, 33 U.S.C. § 1365(d); the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) and (F); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. V) § 6972(e); and the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d).

One of the Alliance's foremost purposes is to ensure access to the judicial process for those who have historically lacked the resources to obtain lawyers to assert their rights, including Black and Native Americans, poor persons, consumers, women, children, and persons institutionalized in mental health facilities. Hence, the persons served by Alliance for Justice members are representative of the persons whom Congress sought to afford access to the courts through laws such as Section 1988.

A number of these persons, with the assistance of public interest lawyers, are litigating as "private attorneys general" to advance congressional policies and to protect constitutional rights in cases covered by Section 1988

and other fee-shifting laws.[3] These civil rights cases include, for example, challenges to discrimination in public housing[4] and segregation in public schools.[5] Alliance members have also

3/ The Senate Report accompanying Section 1988 even cites a Title VII case litigated by an Alliance member (the Center for Law in the Public Interest) as an example of a case where the standard for fee awards was properly applied in order "to attract competent counsel" to civil rights cases. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6, reprinted in 1976 U.S. Code & Ad. News 5908, 5913 (citing Davis v. County of Los Angeles, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974)).

4/ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (holding metropolitan areawide relief permissible in case of deliberate racial discrimination in housing).

5/ See, e.g., Columbus Board of Education v. Penick, 443 U.S. 449 (1979) (holding systemwide school desegregation remedy proper on the basis of the lower court's findings and conclusions as to unconstitutional, racially segregative purpose and impact of school board's conduct); Liddell v. Board of Education, 491 F. Supp. 351 (E.D. Mo. 1980), aff'd, 667 F.2d 643 (8th Cir. 1981), cert. denied sub nom. Caldwell v. Missouri, 454 U.S. 1081, 1091 (1981) (holding St. Louis Board of Education and State of Missouri liable for the establishment and maintenance of a racially segregated public school system within St. Louis).

been litigating significant cases on behalf of consumers,[6] parents seeking to enforce child support orders,[7] juveniles,[8] and Black schoolchildren

6/ See, e.g., Consumers Union v. Virginia State Bar, C.A. No. 75-0105-R (E.D. Va. 1975) (settled after suing for right to provide information about law firms in a legal directory without being subject to disciplinary action).

7/ See, e.g., Jenkins v. Massinga, No. M-83-4134 (D. Md. order dated Aug. 3, 1984) (protecting custodial parents' and childrens' right to receive full proceeds from child support awards, without illegal deductions); see also Parents Without Partners v. Massinga, C.A. No. JH-83-4314 (D. Md. consent decree dated Jan. 11, 1984) (state defendants agreed to provide child support enforcement services to all eligible parents in compliance with federal law).

8/ See, e.g., Coleman v. Stanziani, 570 F. Supp. 679 (E.D. Pa. 1983) (holding that plaintiffs challenging constitutionality of Pennsylvania juvenile pretrial detention statutes were not required to exhaust state remedies), appeal dismissed, 735 F.2d 118 (3d Cir. 1984); Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (E.D. Pa. 1979) (denying summary judgment where "deprived" child alleged failure to provide him with adequate care, treatment, and services which would have enabled him to return home) (case later settled); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977) (denying in part motion to dismiss complaint that conditions and treatment of Youth Study Center deprived juveniles of constitutional rights) (case later settled).

challenging the use of standardized IQ tests to place them in programs for mentally retarded students.9/

Often, Alliance members have been able to enforce their clients' constitutional or statutory rights through a negotiated settlement of litigation.10/ However, some cases have proven difficult to conclude through settlement, for a wide variety of reasons. In some of the cases litigated by Alliance members, for example, judicial resolution of an unsettled

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9/ See, e.g., Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979).

10/ Settlements were achieved, for example, in Parents Without Partners v. Massinga, C.A. No. JH-83-4314 (D. Md. 1984); Cameron v. Montgomery County Child Welfare Service, 471 F. Supp. 761 (E.D. Pa. 1979); Santiago v. City of Philadelphia, 435 F. Supp. 136 (E.D. Pa. 1977); and Consumers Union v. Virginia State Bar, C.A. No. 75-0105-R (E.D. Va. 1975).

question of law has been an important precondition to settlement.11/

The availability of attorney's fees under statutes such as Section 1988 has improved the ability of Alliance members to secure legal services for otherwise unrepresented segments of the public. The statutory fee awards that these nonprofit organizations receive are channeled directly into continuing and when possible expanding the legal representation they offer. Furthermore, the availability of fees may make it easier for these groups to refer cases to other attorneys, including private counsel, when their own limited resources are insufficient. Members of the Alliance thus have a strong interest in the application of Section 1988, since the Court's

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11/ See, e.g., Hills v. Gautreaux, 425 U.S. 284 (1976) (settled following the Supreme Court's determination of whether and to what extent area-wide relief should be available to remedy deliberate racial discrimination in housing).

interpretation of the statute may well affect their ability to ensure representation for those citizens who need it.12/

For these reasons, the Alliance will address the first issue that is before the Court: Whether Rule 68 of the Federal Rules of Civil Procedure should be interpreted as requiring an attorney's fee sanction against a prevailing civil rights plaintiff who has refused a settlement offer. The Alliance respectfully submits that this issue was correctly decided by the Court of Appeals for the Seventh Circuit when it determined that Rule 68 and Section 1988 do not provide for such an attorney's fee sanction.

12/ It is important to note, however, that fee awards do not subsidize these organizations. For the majority of Alliance members, fee awards comprised only one to twelve percent of the organization's 1983 budget.

SUMMARY OF ARGUMENT

Petitioners (and their supporting amici) are urging the Court to adopt a judicial construction of Rule 68 of the Federal Rules of Civil Procedure that will effectively rewrite the Civil Rights Attorney's Fee Awards Act of 1976 (and ninety-one other acts of Congress that the Solicitor General asserts have similar wording). However, neither members of Congress, nor the drafters of the Federal Rules, intended this result. Rather, they intended the term "costs" in Rule 68 to have its traditional meaning, and not to include attorney's fees.

Neither Congress nor the Advisory Committee intended to abrogate this traditional distinction between fees and costs in 1938, or in the forty-six years since the Federal Rules were submitted for Congressional approval. The language in the 1976 Fees Act which refers to

attorney's fees "as part of costs" is not intended to abrogate that distinction; rather it is intended to enable federal district judges to award attorney's fees against state officials notwithstanding the Eleventh Amendment's bar of retroactive relief in the form of damages.

Moreover, the interpretation of Rule 68 that petitioners urge the Court to adopt would be highly inconsistent with Congressional purposes in enacting the Civil Rights Attorney's Fee Awards Act, and would create serious legal, practical, and policy problems as applied to both the 1976 Fees Act and to other fee-shifting statutes.

The petitioners' request for such substantial modifications in the Federal Rules and the 1976 Fees Act should be addressed to Congress, not to the Court. Congress has the institutional competence to weigh competing points of view and

determine whether amendments are warranted, and if so, what their design and scope should be.

In fact, Congress is already considering a request quite similar to the one advanced by petitioners here. This request to amend Section 1988 has generated considerable controversy. During 1981 and 1982 hearings on the proposal, witnesses varied widely on whether and to what extent such an amendment was needed, what its impact might be, and what form it might take. None of the witnesses, however, suggested, as do the petitioners here, that Rule 68, or the 1976 Fees Act, already provided for such an attorney's fee sanction.

Finally, there is no need for the Court to fashion a procedural tool of the type petitioners seek. There has been no demonstration that existing incentives

are inadequate to produce fair settlements in appropriate cases. Furthermore, sanctions are already available under existing case law and statutory provisions for situations in which attorneys litigate in bad faith under fee-shifting statutes, refuse to entertain settlement offers in good faith, or multiply or prolong litigation unreasonably and vexatiously.

ARGUMENT

I. THE TERM "COSTS" IN RULE 68 DOES NOT INCLUDE ATTORNEY'S FEES.

A. The Drafters and Revisers of the Federal Rules of Civil Procedure Have Retained the Traditional Distinction Between Fees and Costs.

There has always been a sharp distinction between costs and attorney's fees under traditional principles of American law. Costs are generally

awarded to the prevailing party unless the court directs otherwise; however, each party bears his or her own attorney's fees unless there is an explicit statutory provision to the contrary. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). Also under traditional principles, although costs are shifted as a matter of course at the close of the litigation, attorney's fees can only be shifted pursuant to defined criteria and are not shifted automatically.

Both the original Advisory Committee that drafted the Federal Rules of Civil Procedure (in 1935 to 1938) and subsequent Advisory Committees revising the rules have retained the traditional distinction between costs and attorney's fees. Where the rules are intended to refer to costs, as in Rule 54, the term "costs" is used. Where the rules are

intended to refer to attorney's fees, the term "attorney's fees" or "expenses, including attorney's fees" is used. See Rules 11, 16(f), and 26(g) (as amended in 1983); and Rules 30(g), 37, and 56(g).13/

This distinction is reinforced by the fact where attorney's fee sanctions (as opposed to cost assessments) are included in the Federal Rules, the Advisory Committee has often made express reference to that fact, and discussed the reasons for the fee sanction in a Committee Note. See, e.g., Advisory Committee Notes (1983 Amendment) to Rules 11, 16(f), and 26(g). Additionally, where the drafters of the Federal Rules

13/ The decisions of this Court in Delta Airlines, Inc. v. August, 450 U.S. 346 (1981), and Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), recognize the distinction in the Federal Rules between costs and attorney's fees. These decisions are discussed in detail in the Amicus Brief of the Association of the Bar of the City of New York (Supporting Respondent) at 9-16; that discussion will not be duplicated here.

have included an attorney's fee sanction in the rules, they have provided a precise description of the type of conduct or the degree of culpability necessary to invoke the sanction; none of the Federal Rules include the type of automatic, mandatory fee sanction that petitioners urge here. See, e.g., Rules 7, 8, and 11, and Advisory Committee Notes (1983 Amendment) to Rule 11; Rule 16(f); Rule 26(f) and (g), and Advisory Committee Note (1983 Amendment); and Rule 56(g).

Moreover, nowhere in the 1938 version of the Federal Rules of Civil Procedure, the accompanying Advisory Committee Notes, subsequent amendments to the rules or accompanying Committee Notes, is there any reference to the question of whether or not certain statutes "define attorney's fees as part of costs" (Petitioners' Brief at 11,

18-19), or any reference to the significance of such statutory language in interpreting and applying the Federal Rules. There is, in other words, no historic evidence that the drafters of the Federal Rules were aware of or intended the potential interpretation urged in this case. On the other hand, there is evidence that to the limited extent drafters of the first set of Federal Rules intended to recognize and incorporate statutory provisions relating to costs they did so explicitly. See Advisory Committee Note accompanying Rule 54. No such reference accompanies Rule 68, and this Court should be reluctant to imply that one was intended.

B. Congress, In Its 1938 Approval of the Federal Rules of Civil Procedure, Did Not Amend, Sub Silentio, Existing Fee-Shifting Statutes.

Nor should the Court assume that Congress, simply by its approval in 1938 of the first set of the Federal Rules of Civil Procedure (including Rule 68) intended to modify the fee-shifting statutes it had already enacted, such as the Clayton Antitrust Act (15 U.S.C. § 15), the Interstate Commerce Act of 1887 (49 U.S.C. §§ 8, 16, 908(b) and (e)), or the Copyright Act of 1909 (17 U.S.C. § 40, now codified at 17 U.S.C. § 505), inter alia. As noted above, there is no evidence in either the rules or the legislative materials relevant to their approval to indicate that the Advisory Committee or the Court were recommending such a sub silentio

amendment of existing statutes, notwithstanding the Solicitor General's contentions that such an implied modification of existing statutes must have been intended. Brief of Solicitor General at 12-14.

Nor, for that matter, can one assume that members of Congress even considered the possibility of such a sub silentio amendment of existing fee allocation statutes when they approved the first set of rules in 1938. As Justice Frankfurter pointed out in his dissent in Sibbach v. Wilson & Co., Inc.:

> ... [L]ittle significance attaches to the fact that [in 1938] the Rules, in accordance with the statute, remained on the table of two Houses of Congress ... and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the

> Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.

312 U.S. 1, 18 (1940) (emphasis added). Justice Frankfurter's observations apply with even greater force in the instant case, where the interpretation that petitioners urge Congress "must have intended" could not have been inferred by the legislators from a reading of the rules, but would have required them to also make detailed reference to the exact language of all fee allocation statutes enacted prior to 1938.

Moreover, even if members of Congress had considered the possibility in 1938 that Rule 68 would amend, sub silentio, some existing fee allocation statutes, they would not have approved it. Both proponents of the Rules Enabling Act and members of Congress had, just a few years earlier, articulated

clear limits on the rulemaking powers that the Court would be granted: That power would not include the authority to "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072. As Thomas Shelton, the Chair of the ABA Committee on Uniform Judicial Procedure, had explained at hearings on the Rules Enabling Act: "[T]he Supreme Court is not going to hold that it has the power to legislate, and it will confine itself to regulating the detail machinery of the trial courts." Reforms in Judicial Procedure: American Bar Association Bills, Hearings Before the House Judiciary Committee, 63rd Cong., 2nd Sess. 22 (1914); see also H.R. Rep. No. 462, 63d Cong., 2d Sess. 16 (1914) ("the rules will not have the effect or dignity of statutes").14/

14/ See generally Burbank, The Rules Enabling Act of 1934, 130 Penn. L. Rev. 1015 (1982).

In light of these factors, it is perhaps not surprising that in the first thirty-seven years following the adoption of the Federal Rules of Civil Procedure there is only one reported case in which a litigant made an argument analogous to the argument advanced by petitioners here. In that case, Gamlen Chemical Co. v. Dacar Chemical Products, 5 F.R.D. 215, 216 (W.D. Pa. 1946), the court rejected the plaintiff's contention that the phrase "with costs then accrued" in Rule 68 had to be read as referring to attorney's fees because the substantive statute provided for an award of attorney's fees "as part of costs."15/

15/ In more recent years courts have split on the issue presented in Gamlen Chemical Co., in some cases opining that the Rule 68 phrase does not include attorney's fees (Piquead v. McLaren, 699 F.2d 401 (7th Cir. 1983); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980) (dicta)), and in other cases that it does (Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983); Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979); Scheriff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978) (dicta)).

It was not until 1982, in the district court proceedings in this case, that a litigant first advanced the attorney's fee sanction argument made here.16/ However, as explained below, Congress did not intend either the Civil Rights Attorney's Fee Awards Act of 1976 or other fee-shifting laws to be given the interpretation petitioners urge.

C. Nor Did Congress, in Enacting the Civil Rights Attorney's Fees Act of 1976, Abrogate the Distinction in the Federal Rules Between Fees and Costs.

The petitioners and the Solicitor General have attempted to argue that when

16/ But cf. Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976) (court makes a similar suggestion, in dicta); Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201 (E.D. La. 1975) (same); see also Bitsouni v. Sheraton Hartford Corp., 33 F.E.P. Cases 898 (D. Conn. 1983) (same argument asserted successfully by defendant).

Congress enacted the Civil Rights Attorney's Fee Act of 1976, it implicitly adopted an attorney's fee cutoff for refusing a settlement offer (under Rule 68) because it chose language referring to attorney's fees as part of costs. Petitioners' Brief at 18-19; Solicitor General's Brief at 6-8. However, they have not cited and can not cite any historical evidence or pertinent portions of the legislative history to support their argument.

The legislative history of the 1976 Act, important in the consideration of this case, is discussed in detail in the Respondent's Brief, and in the Amicus Briefs of the Lawyers' Committee for Civil Rights Under Law and the NAACP Legal Defense and Education Fund, Inc. (in Respondent's Support). That detailed discussion will not be repeated here. Suffice it to say that several issues

surrounding the settlement of civil rights litigation were considered during legislative deliberations. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912 [hereinafter cited as Senate Report]; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) [hereinafter cited as House Report]. However, there was no consideration of either Rule 68 or any other provision in the Federal Rules of Civil Procedure, and no suggestion that attorney's fees should be reduced or limited if a civil rights plaintiff rejected a settlement offer. Moreover, the legislative history of the Act contains a detailed, comprehensive explication of the factors for a court to consider in setting a fee award (see, e.g., Senate Report at 6), and nowhere in that discussion is there any reference to either Rule 68, or any other Federal

Rule, or to any possibility of reducing attorney's fees if a client rejects a settlement offer.

The only basis for the petitioner's (and the Solicitor General's) assertion that Congress intended to adopt a fee cutoff is the legislators' choice of the following words: "[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. However, there are references in the legislative history explaining why Congress chose this particular terminology. Congress sought, as this Court recognized in Hutto v. Finney, 437 U.S. 678 (1978), to enable federal district judges to award attorney's fees against state officials notwithstanding the Eleventh Amendment's bar of retroactive relief in the form of damages. Id.; see also Senate Report at

5; House Report at 7.17/

Contrary to the assertions of the Solicitor General, the fact that Congress chose this terminology to abrogate Eleventh Amendment immunity does not imply that it chose simultaneously to incorporate the mechanical provisions of an obscure Federal Rule of Civil Procedure. Rather, it suggests simply that Congress chose this terminology for a single, limited purpose, and that the words of the statute are not meaningless or superfluous (as the Solicitor General tries to suggest, Brief at 9) or to be given a different reading from the one Congress intended. As the Fifth Circuit explained in Gates v. Collier, in

17/ Historically, an award of attorney's fees had often been considered an element of damages, not an element of costs. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 249 n.21 (1975); see also Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), cert. granted, 104 S. Ct. 2149 (1984).

weighing analogous arguments that since Congress "defined attorney's fees as part of costs" plaintiffs should be able to recover interest on their fee award:

> [W]hile it is true that § 1988 also defines attorneys' fees as part of costs, see note 9, supra, the legislative history makes clear that this was done for one reason and one reason only: to ensure that the Eleventh Amendment is no bar so that these fees are recoverable against Government officials acting in their official capacity.

616 F.2d 1268, 1276 (5th Cir. 1980), reh'g granted, 636 F.2d 942 (1981). Hence, there is no legislative support for the interpretation petitioners urge.

D. Nor Has Congress Abrogated the Rules' Distinction Between Fees and Costs by Enacting Other Fee-Shifting Statutes in Recent Years.

The fact that Congress has used similar language referring to attorney's fees as part of costs in some of the

other fee-shifting statutes enacted in the years since 1938 does not, by implication, abrogate the traditional distinction between fees and costs adhered to in the Federal Rules. Rather, it illustrates some of the difficulties inherent in adopting petitioners' position.

The Solicitor General asserts, albeit with a margin of error,18/ that seventy-two of the one hundred sixteen

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18/ The Solicitor General errs in characterizing certain of the statutes in Part I of his Appendix as "Statutes Awarding Attorneys' Fees as Part of Costs." Some of the statutes listed in Part I are in fact worded to refer to "costs and expenses (including attorney's fees)," (emphasis added). See, e.g., Magnuson-Moss Warranty - Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d). Statutory language of this type suggests, contrary to the argument advanced by the Solicitor General, that fees are not considered as part of costs, but rather as part of a separate item referred to as "expenses," in the same terminology used frequently in the Federal Rules of Civil Procedure. See discussion of terminology used in the Federal Rules at pages 12-16, above.

federal fee-shifting statutes enacted since 1938 contain language similar to that used in Section 1988. Brief of Solicitor General, Appendix, at 1a-9a.

Hence, if the arguments advanced by the petitioners and the Solicitor General are correct, then numerous other fee-shifting statutes will have to be construed as mandating sizeable attorney's fee sanctions for rejecting a Rule 68 offer of judgment. In fact, this seems to be the result that the Solicitor General seeks. However, there is no legislative history or historical evidence indicating that Congress intended such a result when it enacted these statutes. The legislative materials that do exist suggest that the interpretation urged by petitioners and the Solicitor General would be inconsistent with the fee allocation mechanisms and the statutory objectives

of many of these laws.

For example, such an interpretation would undermine the incentives for enforcement litigation that Congress intended when it enacted fee-shifting provisions as part of a number of environmental protection laws. See, e.g., Clean Air Act (42 U.S.C. § 7607(f)); Endangered Species Act of 1973 (16 U.S.C.A. § 1540(g)(4)); and Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. (Supp. V) § 1349(a)(5)). Provisions of this type were designed to encourage citizens to bring enforcement lawsuits and thereby perform a public service. See, e.g., Senate Report on the Clean Air Act, S. Rep. No. 91-1196, 91st Cong., 2d Sess. 38 (1970).

But those incentives would be destroyed by an interpretation of the type urged here by the petitioners and the Solicitor General, in this way: The

fee allocation sections of these environmental statutes contain terminology (similar to that in Section 1988) referring to fees as part of costs. However, unlike the wording of Section 1988, the language of these laws which allows for a discretionary award of fees to a party does not include an express requirement that the party requesting fees prevail in the lawsuit.19/ Thus, if the requirements of Rule 68 are "read together" with the language of these environmental laws, in a manner analogous to that urged in the instant case, the result may be that an environmental plaintiff who rejects a settlement offer and then fails to recover a judgment as favorable as the offer will suffer a double sanction. He will not only be

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19/ But see Ruckelshaus v. Sierra Club, 103 S. Ct. 3274 (1983) (holding that Congress intended fee awards to be reserved for successful plaintiffs).

unable to recover his own attorney's fees, but also may be liable for the defendant's attorney's fees, from the date of the offer's refusal to the close of the litigation. This is hardly the type of result that Congress contemplated when it drafted the fee-shifting provisions in these environmental statutes.

E. "Plain Meaning" Tenets of Statutory Construction Do Not Compel a Reading of Attorney's Fees as Part of Costs Under the Federal Rules.

Petitioners and the Solicitor General repeatedly contend that when Section 1988 and other fee-shifting statutes are interpreted in accordance with their "plain meaning" the result must be the imposition of an attorney's fee sanction under Rule 68. Petitioners' Brief at 11; Solicitor General's Brief at

3-4, 9-10. However, there are two central fallacies in this assertion.

First, by their apparent reliance upon the "plain meaning" of brief excerpts from the statutory language, petitioners and the Solicitor General fail to recognize the importance of the overall statutory scheme and the legislative history of each of the fee-shifting statutes. As this Court has often recognized, a particular interpretation may appear to be within the letter of a statute, and yet not be correct because it is not within the spirit of the statute or the intention of its makers. See United Steelworkers v. Weber, 443 U.S. 193, 201 (1979), quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). Careful review of legislative materials and the purposes and policies reflected in them has long been the hallmark of this Court's

statutory analysis. See, e.g., Watt v. Alaska, 451 U.S. 259, 266 (1981); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47-48 (1928). Conclusory references to abbreviated excerpts from statutory language, of the type urged by the Solicitor General here, should not be substituted for a thorough review of Congressional enactments and policies.

Second, petitioners and the Solicitor General err in contending that tenets of statutory construction compel a reading of attorney's fees as part of costs under the Federal Rules. The "plain meaning" principle of statutory construction, which suggests interpreting the language of a statute in accordance with its ordinary meaning and usage, is based on the assumption that the legislators were fully aware of the ordinary meaning of the words they chose

to employ, and purposeful in their choice. One cannot assume in the instant case, however, that members of Congress in any way intended their use of the word "costs" in statutory language to be accorded the particularized meaning it would have in petitioners' Rule 68 interpretation.

There is a "plain meaning" of costs in the Federal Rules of Civil Procedure, and it is the traditional definition that does not include attorney's fees. Additionally, there are a series of carefully-articulated, and varying, fee mechanisms that Congress has chosen to encourage enforcement of federal statutory policies. Those mechanisms do not include, in any instance, sanctions for rejecting a settlement offer.

What petitioners (and the Solicitor General) seek from this Court is not a simple "interpretation" of the terms

"costs" and "fees" as used in the Federal Rules of Civil Procedure and of Section 1988. Clear, unambiguous, and longstanding interpretations of the terms used in these contexts already exist. Rather, petitoners are seeking a judicial construction that will effectively amend the Civil Rights Attorney's Fee Act of 1976, and according to the Solicitor General, ninety-one other Congressional enactments also. This would be a drastic step for the Court to take, one that would raise many additional questions and problems, and one more appropriately reserved for legislative consideration.

II. THE ISSUE RAISED IN THIS CASE IS APPROPRIATE FOR LEGISLATIVE, NOT JUDICIAL, RESOLUTION.

When, as in this case, there is an established, longstanding construction of an existing statute or rule, the responsibility for rewriting the statute

or rule lies with Congress, not with the Court. See, e.g., Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). The Court should not reinterpret the statute or rule in a manner that effectively amends it, particularly when (as here) Congress already has the question of whether such an amendment is advisable under active consideration.

These principles apply with particular force in the instant case because the modification of fee allocation rules is a Congressional responsibility. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); see also Blum v. Stenson, 104 S. Ct. 1541 (1984).

Moreover, it is also important to recognize Congress' superior institutional competence in this instance because the procedural modifications urged by petitioners will have a

significant effect on the assertion of substantive rights under the Constitution and federal laws. See Patsy v. Board of Regents, 457 U.S. 496.

In fact, the possibility of an amendment in the 1976 Fees Act to accomplish precisely the result petitioners urge here is being extensively debated in Congress. Proponents and opponents of the measure differ sharply on its policy implications, and about whether or not there is a need for it. The record of Congressional consideration and debate underscores the fact that this matter is appropriate for legislative rather than judicial resolution.

Senator Hatch first proposed the measure during a series of hearings held in 1981 and 1982 to consider amendments in Section 1983 and Section 1988. See Attorney's Fees Awards: Hearings on

S. 585 (and on Amendments to Be Proposed by Senator Orrin G. Hatch) Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess. 12-13 (Comm. Print 1982) [hereinafter cited as 1982 Hearings]; see also Municipal Liability Under 42 U.S.C. 1983: Hearings on S. 584, S. 585, and S. 990 Before the Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 1st Sess. (Comm. Print 1981) [hereinafter cited as 1981 Hearings]. After the hearings, the 97th Congress took no further action on the proposal. In the first session of the 98th Congress, Senator Hatch included an identical proposal in S. 141, a bill including both a "good faith" defense for municipal governments sued under Section 1983 and a number of additional limitations on attorney's fee awards under Section 1988.

S. 141, 98th Cong., 1st Sess., 129 Cong. Rec. S636 (daily ed. Jan. 26, 1983). No hearings on the bill were held and no other action was taken.

Now, in the second session of the 98th Congress, the Administration has requested a similar fee limitation proposal as part of an omnibus attorney's fee bill. H.R. 5757, 98th Cong., 2d Sess. (1984) ("The Legal Fees Equity Act"); S. 2802, 98th Cong., 2d Sess., 130 Cong. Rec. S8498-8500 (daily ed. June 27, 1984). Hearings on the Administration proposal, which may differ slightly from Senator Hatch's earlier bill in its design and scope, were just held by the Subcommittee on the Constitution of the Senate Committee on the Judiciary on September 11, 1984.

As mentioned above, the 1981 and 1982 hearings reflected a wide divergence of opinion on whether there was a need to

increase settlement incentives in civil rights litigation. Witnesses varied considerably in their views on whether and to what extent parties had been able to reach settlement agreements in civil rights cases, and as to what factors and which parties were responsible for the fact that some cases were not settled. Several city attorneys responsible for defending Section 1983 actions claimed that plaintiffs' attorneys sometimes prolonged litigation in order to increase their fee entitlement (1981 Hearings, supra p. 39, at 290, 500, 502-03; 1982 Hearings, supra p. 38, at 7, 90-91, 109), but they gave no specific examples of cases in which plaintiffs rejected reasonable settlement offers.

Other witnesses pointed out that for plaintiffs and their counsel the possibilities of losing a case altogether, failing to recover either

damages or attorney's fees, and facing potential liability for costs already furnished substantial disincentives for refusing a reasonable settlement offer. 1981 Hearings, supra p. 39, at 614-15, 619-20; 1982 Hearings, supra p. 38, at 20, 50-51. In some cases, witnesses reported, government defense attorneys were responsible for prolonging litigation by refusing reasonable settlement offers.20/ In general, the

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20/ Fletcher Farrington, a private practitioner from Georgia, described a case in which a nearby county, against the advice of its lawyers, refused a plaintiff's offer to settle for $8,000. The case went to trial, and the jury returned a verdict of $74,000. 1982 Hearings, supra p. 38 at 44, 48.

Stephen Ralston of the NAACP Legal Defense Fund described a major case against Georgia State Prison officials which continued for seven years and took twenty weeks to try. Finally, after the trial, because of encouragement from the judge, incidents at the prison, and a change in defense counsel, the State agreed to settle the case on basically the same terms that the plaintiffs had offered before the case went to trial. 1981 Hearings, supra p. 39, at 612-13.

legislative record on these settlement issues, as on a number of other attorney's fee issues, was far from conclusive. Both Senator Hatch (who chaired the Hearings) and former Congressman Drinan (who had served as floor manager for the 1976 Fees Act) commented on the need for fuller documentation of the problems alleged. 1981 Hearings, supra p. 39, at 326; 1982 Hearings, supra p. 38, at 72-73.

The fact that, as recently as 1982, members of Congress did not believe they had a sufficient record to address this policy dispute bespeaks the need for legislative deliberation on the matter. As the Court explained in Patsy v. Florida Board of Regents, 457 U.S. at 513-15, when it rejected a request that it reinterpret Section 1983 to require exhaustion of state administrative remedies, the policy issues inherent in

such requests are best addressed by Congress. In language that might well apply also in the instant case, the Court cautioned that:

> [T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.

Id. at 513 (footnotes and citations omitted).

Furthermore, in the instant context as in Patsy, serious questions have been raised not only about whether there is a need to amend the law, but also about the design and scope of the proposed amendment. For example, Neil Bradley, testifying against the proposal during

the 1982 hearings (on behalf of the American Civil Liberties Union), pointed out the difficulty of predicting the outcome in some cases because an attorney would not have received detailed facts from discovery responses at the time of the settlement offer, and in other cases because statutory provisions, case law, or witnesses' recollections might change between the time of the offer and the time of trial. 1982 Hearings, supra p. 38, at 17-18, 29-31. Bradley also noted that situations might well arise in which an attorney would recommend settlement, a client could refuse, and that attorney would nevertheless be obligated to continue representing that client on a meritorious claim, but without any compensation for his or her services. Id. at 17. In this situation, as in the situation in which an attorney is asked to simultaneously negotiate a

settlement of his or her own fees and a settlement of the merits of a client's claim, Bradley emphasized the potential for ethical problems. Id. at 17-18, 29-31.

Fletcher Farrington, a private practitioner from Southern Georgia who had handled civil rights cases for both plaintiffs and defendants under Section 1983, also testified against the proposed amendment to Section 1988. 1982 Hearings, supra p. 38, at 52. Farrington pointed out that a determination (pursuant to the proposed statutory language) of whether the relief embodied in a final judgment was as favorable as that tendered in a settlement offer would often require collateral, case-by-case litigation. Id. Farrington also expressed concern about the ethical problems the proposed amendment would engender, and suggested that the

available cost sanctions under Federal Rule of Civil Procedure 68 were already working to discourage unnecessary litigation, without provoking the kinds of attorney-client conflict likely to result from an attorney's fee sanction. Id.21/

As this testimony suggests, the practical and policy issues surrounding the imposition of an attorney's fee sanction are more appropriate for legislative than judicial determination. The Court weighed similar factors in Patsy v. Board of Regents, and observed:

> These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the

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21/ None of the witnesses testifying at the 1981 or 1982 hearings took the position that either Rule 68 or Section 1988 already provided for an attorney's fee sanction of the type urged by petitioners here.

> judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.

457 U.S. at 514. In the instant case, a determination to impose attorney's fee sanctions for rejecting a settlement offer will engender a similar series of collateral substantive and procedural questions with important policy implications.

The difficulty of these issues will be compounded by the fact that an interpretation of Congressional purposes and fee allocation mechanisms in not just one, but several dozen varying statutory schemes will be required. Although the Alliance for Justice (as amicus curiae) respectfully submits that it is important for the Court to be cognizant of these policy issues, their resolution is best reserved for Congress to consider.

III. THE INTERPRETATION URGED BY THE PETITIONERS WILL ENGENDER MANY PROBLEMS.

If the Court adopts the interpretation of Rule 68 and numerous fee-shifting statutes urged by the petitioners and the Solicitor General, there will be a wide variety of problems in refining that interpretation and administering the fee sanctions which will result. Many of these problems, such as applying the rule to class actions and cases involving declaratory or injunctive relief, are explained in the briefs of other amici supporting respondents. Several others, however, merit mention here.

A. Under Rule 68, Plaintiffs and Their Counsel Must Forfeit All Fees for Post-Offer Services, Regardless of Their Reasonableness and Good Faith in Rejecting the Offer.

The attorney's fee sanction petitioners seek would apply automatically, under the terms of Rule 68, whenever a plaintiff refuses a settlement offer and then fails to obtain a judgment that is as favorable. However, such an automatic fee cutoff or fee-shifting sanction will be highly inequitable in many circumstances, penalizing the plaintiff (and his or her counsel) for a reasonable, good-faith decision to continue litigating. As the Court observed in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978):

> [S]eldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's

> claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bring suit.

Recently, the Justice Department made the same point in a letter questioning a proposal by the Advisory Committee on the Federal Rules of Civil Procedure to expressly amend Rule 68 to include fee cutoff and fee-shifting sanctons: "[E]valuating litigation hazards is an extremely difficult task in any suit." Letter from D. Lowell Jenson, Acting Deputy Attorney General to the Honorable Edward T. Gignoux, Chair, Committee on Rules of Practice and Procedure, February 28, 1984 (copy on file at the Administrative Office of the United States Courts).

Moreover, in many cases it is likely that the margin between the rejected offer and the judgment obtained will be relatively small. The instant case is a good example: Petitioners assert that their offer was for $100,000 (inclusive of attorney's fees); the respondent ultimately recovered $92,000 (a verdict of $60,000 in damages and pre-offer fees in the amount of $32,000). It is unfair to penalize plaintiffs who have litigated in good faith under such circumstances. Members of the Advisory Committee, in a draft Note accompanying their recent proposal to include attorney's fee sanctions in Rule 68, termed such an "all or nothing" rule of this type "Draconian" in its impact. 98 F.R.D. 337, 365 (1983).

B. The Petitioners' Interpretation of Rule 68 Will Engender Substantial Litigation on Collateral Issues.

Faced with such drastic fee sanctions, both parties and their counsel are likely to raise a substantial number of problems and issues in collateral litigation: For example, was the Rule 68 offer valid in its form? Was the judgment obtained actually less favorable than the rejected offer, particularly insofar as either the offer or judgment (or both) included declaratory or injunctive relief? What effect, if any, should the rejection of a reasonable counter-offer have on the imposition of sanctions?

Moreover, many litigants will assert, as the petitioners and the Solicitor General imply throughout their briefs, that notwithstanding the mandatory terminology used in Rule 68, a

court's imposition of fee sanctions for refusing a settlement offer should be discretionary, and based either on the "reasonableness" of the offer or the "unreasonableness" of its rejection. Even assuming, arguendo, that Rule 68 can be construed as providing a district judge with discretion to deny an attorney's fee sanction, additional questions and difficulties (of the type described below) will arise in collateral litigation. This litigation will require a substantial use of judicial resources on non-substantive issues, and prove problematic for judges, parties and their attorneys. Neither Rule 68 nor Section 1988 contain any standards to guide the courts in addressing these questions. For example, if a plaintiff seeking to avoid the imposition of Rule 68 sanctions must demonstrate that the rejection of an offer was reasonable at the time it was

made, that plaintiff or his or her attorney may be forced to reveal privileged attorney-client communications or confidential work product material. This is particularly problematic if an appeal or related cases are still pending.

However, if the district judge postpones attorney's fee proceedings until after an appeal or the conclusion of related litigation it will be virtually impossible to determine the "reasonableness" of the rejection of the settlement offer. As Justice Rehnquist observed in his dissenting opinion in Delta Airlines, Inc. v. August,

> To import into the mandatory language of Rule 68 a requirement that the tender of judgment must be "reasonable" or made in "good faith" not only rewrites Rule 68, but also puts a district court in the impossible position of having to evaluate such uncertain and

> nebulous concepts in the context of an "offer of judgment" that may in many cases have been made years past.

450 U.S. at 369 (1981).

Additionally, the adoption and administration of fee sanctions as urged by petitioners and the Solicitor General will greatly increase the potential for conflict in the attorney-client relationship, for several reasons. First, the kinds of disclosure problems outlined above will surface frequently, and will require a difficult balancing of competing interests.

Second, because the petitioners and the Solicitor General urge this Court to construe Rule 68 in a manner that would appear to require simultaneous negotiation of the merits and the fee award, and because the stakes for the attorney will be higher than they are now, the existing

potential for conflict between an attorney and client in this situation will be exacerbated. Although the problems of simultaneous negotiation have been widely recognized (see, e.g., Mendoza v. United States, 623 F.2d 1338, 1352-53 (9th Cir. 1980), cert. denied sub nom. Sanchez v. Tucson Unified School District, 450 U.S. 912 (1981); Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); see also Opinion No. 80-94 of the Committee on Professional and Judicial Ethics of the New York City Bar Association, 36 Record of the N.Y.C.B.A. 507 (1981)), no satisfactory solutions have been identified.22/

Third, there will be further conflict resulting from the fact that the rules of professional responsibility require a lawyer to "abide by a client's

22/ See the discussion of this issue in the Amicus Brief filed by the NAACP Defense and Educational Fund, Inc. (in Respondent's Support).

decision whether to accept an offer of settlement of a matter..." (ABA Model Rules of Professional Conduct, Rule 1.2(a); emphasis supplied), but the sanctions petitioners are seeking for the refusal of an offer will fall most heavily on the attorney (who in some instances may have even recommended that his or her client accept the settlement offer). These problems will prove difficult, if not insurmountable, for the courts and will gradually and increasingly deter attorneys from accepting cases covered by the fee-shifting statutes.

IV. THE RULE URGED BY PETITIONERS IS NOT NECESSARY TO CURB ANY ALLEGED LITIGATION PROBLEMS.

Petitioners and the Solicitor General are proposing a remedy for what they allege are litigation problems under fee-shifting statutes. However, they

have failed to demonstrate that the problems they allege in fact exist or are serious enough to warrant the drastic measure they propose. They have failed to show, for example, that the respondent in this case acted unfairly or unreasonably; a careful review of the facts surrounding the settlement offer would seem to suggest just the contrary. See Statement of the Case in Respondent's Brief. Moreover, they have failed to demonstrate that civil rights plaintiffs or plaintiffs under fee-shifting statutes generally act unfairly or unreasonably in considering settlement offers.

In many cases, civil rights and public interest plaintiffs have fairly and successfully negotiated settlements.[23/] There is no evidence

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23/ See the case examples, cited supra pp. 6-7 nn. 10, 11.

that the incentives to do so are inadequate. As the Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, observed in opposing the recent Advisory Committee proposal to increase Rule 68 sanctions:

> It has been my experience that the economic incentives to accept reasonable offers are generally more than sufficient in the settlement of cases. While it is true that sometimes reasonable offers may be rejected by a party, these are only in exceptional matters. I do not believe a rule change so sweeping as proposed in the above amendment to Rule 68 is required or even desirable.
>
> Instead of improving the efficiency of our Courts, the proposed amendments may actually add an additional responsibility on an already overburdened judiciary.

Letter from the Honorable James McGirr Kelly to the Committee on Rules of Practice and Procedure, December 14, 1983 (copy on file at the Administrative

Office of the United States Courts).

Existing law already provides district courts with authority (and guidance) to curb abuses if and when attorneys litigate in bad faith under fee-shifting statutes, or refuse to entertain settlement offers in good faith. Case law provides that in such circumstances a fee award may be refused altogether. Brown v. Stackler, 612 F.2d 1057 (7th Cir. 1980); Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977).24/

However, the courts that have considered the matter have been careful to note that the rejection of a settlement offer may well be fair and reasonable, and should not, in and of itself, be a basis for denying attorney's

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24/ See also the provisions in 28 U.S.C. § 1927 (as amended in 1980) for sanctioning attorneys who multiply or prolong litigation unreasonably and vexatiously.

fees. Coop v. City of South Bend, 635 F.2d 652, 655 (7th Cir. 1980); Mid-Hudson Legal Services v. G. & U., Inc., 465 F. Supp. 261, 267 (S.D.N.Y. 1978).

It is logically unsound, and unfair, to make the decision about whether or not to accept a settlement offer the sole or even the primary basis for sanctioning an attorney when the rules governing professional responsibility provide for the client to make that choice. The decision about whether or not to settle is often a difficult one, and one which ultimately should be reserved for the client to make.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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*/ Christopher Palmer and Anthony Ruvolo, second year students at Georgetown University Law Center, provided valuable assistance in the researching and drafting of this brief.